Dec CD.

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,

Petitioner,

vs.

COURT OF APPEAL

FIRST APPELLATE DISTRICT

STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A COURT REPORTER IS REQUIRED IN A MISDEMEANOR CRIMINAL TRIAL UNDER THE SIXTH AMENDMENT, AND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, WHEN:

A. A RECORD AT THE TRIAL IS A FUNDAMENTAL RIGHT?

B. CALIFORNIA LAW PROVIDES THAT COURT REPORTERS ARE PROVIDED ON REQUEST IN FELONY TRIALS, JUVENILE HEARINGS, AND IN SUPERIOR AND MUNICIPAL COURT CIVIL PROCEEDINGS?

C. CALIFORNIA CODE OF CIVIL PROCEDURE 274(c) PROVIDES THAT A COURT REPORTER IS NOT PROVIDED IN A MUNICIPAL COURT CRIMINAL (MISDEMEANOR) TRIAL UNLESS ORDERED BY THE COURT?

QUESTIONS PRESENTED (Continued):

D. A CRIMINAL TRIAL IN WHICH LOSS OF LIBERTY CAN RESULT IS FUNDAMENTALLY UNFAIR WITHOUT A COURT REPORTER AND AN ACCURATE RECORD AT THE PROCEEDINGS?

E. A MISDEMEANOR DEFENDANT WHO HAS BEEN DENIED A COURT REPORTER AT THE TRIAL IS FORECLOSED FROM THE AVAILABILITY OF A TRANSCRIPT AND ADEQUATE RECORD FOR APPEAL; AND WHETHER THIS IMPOSES AN UNREASONED DISTINCTION ON OPEN AND EQUAL ACCESS TO THE COURTS OF APPEAL, WHEN OTHER APPELLANTS HAVE TRANSCRIPTS?

II. WHETHER A MISDEMEANOR DEFENDANT'S RIGHTS TO THE PRESUMPTION OF INNOCENCE UNDER THE SIXTH AMENDMENT AND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH

QUESTIONS PRESENTED (Continued):

AMENDMENT WERE VIOLATED BY THE PROSECUTOR'S REPEATED OBJECTIONS, MADE DURING DEFENSE COUNSEL'S CLOSING ARGUMENT, AND UPHELD BY THE COURT, THAT THE DEFENDANT WAS NO LONGER PRESUMED INNOCENT AND THAT THE TRIAL WAS OVER; AND WHETHER THIS, COMBINED WITH OTHER ERRORS AT THE TRIAL, RENDERED THE DEFENDANT'S CONVICTION VOID?

III. WHETHER CALIFORNIA RULES ON APPEAL IMPOSE ADDITIONAL UNREASONED DISTINCTIONS ON MISDEMEANOR APPELLANTS?

PARTIES TO THE PROCEEDING[1]

(1) The parties are the petitioner and defendant, Edward Wrighting, Jr., and the Court of Appeal, First Appellate District, State of California. The California Supreme Court denied Wrighting's Petition for Hearing. Wrighting had petitioned the Court of Appeal for mandamus, to compel the Appellate Department of the Superior Court of Alameda County (California Real Party in Interest) to certify Wrighting's misdemeanor conviction in the Livermore-Pleasanton Municipal Court, for review by the Court of Appeal.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

Petitioner Edward Wrighting, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal, First Appellate District, State of California,

denying Wrighting's Petition for Mandamus.

OPINION BELOW.

The judgment of the Court of Appeal, was entered on April 8, 1980, and appears in Appendix A. A timely Petition for Hearing to the California Supreme Court was denied on May 8, 1980. (Appendix B.) No opinions were rendered.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U.S. 1257(3).

The Appellate Department of the Superior Court of Alameda County (California Real Party in Interest) affirmed Wrighting's criminal conviction of a misdemeanor on January 16, 1980. (Appendix C.) The Appellate Department denied Wrighting's timely petition for certification to the Court of Appeal on January 31,1980. (Appendix D.) The Court of Appeal denied Wrighting's timely Petition for Mandamus on April 8, 1980. (Appendix A.) The Supreme

Court of California denied the Petition for Hearing on May 8, 1980. (Appendix B.)

This Petition for Certiorari is filed within 90 days of that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Sixth Amendment to the Constitution of the United States reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States reads in pertinent part:

> *** No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure 274(c) reads in pertinent part:

> Official reporters of a municipal or justice court, or any one of them, must as the request of either party or on the order of the court in a civil proceding, or on the order of the court in a criminal action or proceding, take down in shorthand all the testimony ***.

Other California statutes cited in this Petition are set forth in Exhibit E to the Petition.

STATEMENT OF THE CASE

Wrighting was charged with a violation of California Vehicle Code 23102a, misdemeanor driving under the influence of alcohol, second offense, on September 14, 1976, in the Livermore-Pleasanton Municipal Court of Alameda County.

California Vehicle Code 23102d pro-

vides that a second conviction within five years of a prior conviction shall be punished by imprisonment in the county jail for not less than 48 hours nor more than one year, and by a fine of not less than two hundred seventy-five dollars ($275) nor more than one thousand dollars ($1000). (Appendix E.) Wrighting had a prior conviction within five years of this offense.

Wrighting entered a plea of not guilty. He made a motion for the Municipal Court to provide a court reporter for his jury trial. (R. 10-11.) That motion was denied. (R. 15.)

On December 6 and 7, 1977, Wrighting was tried by jury in the Livermore-Pleasanton Municipal Court without the services of a court reporter. The trial lasted for two days; seven witnesses testified.

On December 7, 1977, the prosecutor interrupted defense counsel at a critical point in her closing argument, as she began to speak about the presumption rooted in Anglo-American jurisprudence that the defendant is presumed innocent until proven guilty. The prosecutor objected that Wrighting was no longer presumed innocent because the trial was over. The court upheld the prosecutor, stating to defense counsel: "Counsel, you are misstating the law." (R. 24., p.3., R. 25., R. 30.) (2)

The prosecutor repeated the objections. A heated debate ensued for

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(2) The references to the record herein are to the three settled statements prepared by defense counsel (R. 24), the prosecutor (R.25) and the court (R. 30). References are made to all three of the statements because there are frequently conflicting versions of what transpired.

several minutes between defense counsel, the prosecutor, and the court, in front of the jury. The court again maintained that at that point in time, during defense counsel's closing argument that the defendant was no longer presumed innocent because the trial was over.

The jury was instructed on three separate occasions, twice at their request during the course of deliberations. The court first instructed the jury at about 10:35 a.m. At about 2:30 p.m., the jury requested reinstruction on reasonable doubt. The court re-read a series of instructions, and then improvised an unsolicited instruction on circumstantial evidence. (3)

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(3) There are conflicting versions of what happened thereafter. During this improvisation, Wrighting alleges that

The jury later requested xeroxed instructions. Defense counsel and the prosecutor were called into chambers for the purpose of preparing the instructions. The three could not agree on which instructions had been given to the jury the first and second times.

Certain passages were excised from pages of standard instructions, and assembled by the court with scissors and tape. There was disagreement on which instructions should be offered to the jury. There is no record of which

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(3) (Con't.)

there was a prejudicial interruption by the prosecutor who approached the bench and whispered something to the court, whereafter the court added a conclusion to the improvisation negative to the Defendant. (R. 24., p. 3.) The prosecutor does not recall approaching the bench. (R. 25.) The court believes defense counsel approached the bench. (R. 30.)

instructions were given to the jury on any occasion, and there are different recollections on which instructions were given. (R. 24., R. 25., R. 30.)

At about 3:35 p.m., the jury returned with a verdict of guilty. A final judgment of conviction was entered on January 6, 1978. Wrighting was confined to the county jail for forty-eight hours, fined $440, and placed on court probation for two years. (R. 20.)

Wrighting filed a Notice of Appeal on February 2, 1978, and filed his proposed settled statement on March 8, 1978. (R. 24.) The prosecutor filed his settled statement on March 20, 1978. (R. 24.) A settled statement was prepared and filed by the court on or about September 7, 1978. (R. 30.) The three statements are conflicting. The

court's statement was not certified; there was no notice sent to the parties in advance of settling the statement; and the statement did not include Wrighting's grounds for appeal. The foregoing proceedures are mandated by California Rule of Court 187. (Appendix E.)

Wrighting explicitly raised the federal questions in the appeal of his conviction to the Appellate Department of the Alameda County Superior Court. The following were included among the "Questions Presented:"

> " I. WAS APPELLANT DENIED HIS FEDERAL CONSTITUTIONAL RIGHTS AT THE TRIAL DUE TO PROSECUTORIAL MISCONDUCT AND THE PREJUDICIAL ACTIONS OF THE COURT?
>
> II. WAS APPELLANT DENIED HIS FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY THE FAILURE TO PROVIDE A COURT REPORTER?
>
> III. HAS THE DENIAL OF A COURT REPORTER AT THE TRIAL IMPEDED APPELLANT'S ACCESS TO ADEQUATE APPELLATE REVIEW?

IV. IS SECTION 274c OF THE CALIFORNIA CODE OF CIVIL PROCEDURE UNCONSTITUTIONAL ON ITS FACE AS A DENIAL OF APPELLANT'S FEDERALLY PROTECTED RIGHTS TO EQUAL PROTECTION OF THE LAW?"

(R. 34, p. 1.)

Other federal questions included in the "Questions Presented" were addressed to the denial of appellant's federal constitutional rights to due process and assistance of counsel.

The case was submitted to the Appellate Department of the Alameda County Superior Court on April 20, 1979.

On January 6, 1980, the Appellate Department affirmed Wrighting's conviction without a written opinion and without passing on the federal questions raised on appeal. (Appendix C.)

Wrighting filed a timely petition with the Appellate Department to have the case transferred to the District Court of Appeal. (R. 40.) That request

was denied on January 31, 1980. (Appendix D.)

Having exhausted his rights of appeal, Wrighting thereafter filed a timely petition for an extraordinary writ (mandamus) in the Court of Appeal, First Appellate District. (R. 43.) This was denied by the Court of Appeal on April 8, 1980. (Appendix A.) A subsequent timely petition for hearing to the Supreme Court of California was denied on May 8, 1980. (Appendix B.)

The federal questions were explicitly raised by Wrighting at each stage of these proceedings.

This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

The issue of whether a court reporter is constitutionally required at a misdemeanor criminal trial is a novel and unsettled federal question, not heretofore decided by this Court, but of tremendous importance to misdemeanor defendants in California and in other states where court reporters are not provided in misdemeanor trials.

A court reporter provides the impartial, verbatim, written account of what is happening at the trial. The reporter and the record assist the court, prosecutor, and defense counsel in the conduct

of the trial, with an instant, accurate record of the testimony, evidence, and events. A reporter is able to assist the jury during deliberations by reading back requested portions of the testimony or instructions.

But even more, a court reporter warrants an open trial, by recording everything that transpires, thus ensuring that procedural rights are respected. A court reporter and a record have the same function as an open trial, acting as a restraint on the possible abuse of judicial power, and aiding the accuracy of the trial factfinding process.

Without a court reporter at the trial, there is no verbatim documentation of the testimony, objections, and arguments to the jury. Counsel, prosecutor, and the court have no record to fall back on during the trial. Mistakes can be made

about the contents of prior testimony; there can be uncertainty about the evidence; errors may remain uncorrected; and there may be no way to resolve disputes about what happened.

Without a court reporter at the trial, there can be no transcript to provide the reviewing court with documentation of what happened. If counsel, the prosecutor, and the court cannot reconstruct an account of the trial on which they all agree, as they could not in this case, there is no adequate record on appeal.

Without a court reporter and a verbatim record, the public's right to know what transpired in a criminal trial is impaired. A trial without a court reporter is like a closed trial, which

> " . . . breeds suspicion of prejuduce and arbitrariness which in turn spawns disrespect for the law."

Richmond Newspapers, Inc. v. Virginia, (1980) _____U.S. _____. (No. 79-243.)

(Decided July 2, 1980.)

In California, felony and juvenile defendants receive a court reporter at their trials. Superior and municipal court civil litigants receive them. A misdemeanor defendant may or may not receive one, depending on the county or courtroom in which he is tried.

This arbitrary decision of whether or not to provide a court reporter to a misdemeanor defendant is authorized by California Code of Civil Procedure 274(c), which permits the decision to be made by each municipal or justice court, without any guidelines for granting or denying a reporter.(4)

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(4) Of the counties in California, it is known that the following provide court reporters to misdemeanor defendants as a matter of right: Contra Costa, Marin, Napa, Sacramento, San Francisco, San Mateo, Santa Clara, Solano. The following counties have no municipal courts, but do provide court reporters in justice court criminal trials: Colusa, Sutter, and Yuba.

Only the northern portion of Monterey County (Salinas) provides court reporters;

The question of whether a court reporter is required at a misdemeanor trial is not limited to California; the problem is unsettled on a national basis. Misdemeanor defendants in some states receive records at their trials and have transcripts available for appeal. Misdemeanor defendants in other states do not.

Just as this Court has considered and decided whether a misdemeanor defendant is entitled to a jury trial (Baldwin v. New York (1970), 398 U.S. 73), to coun-

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(4) (Con't.) elsewhere in Monterey County, none are provided. In large part, Los Angeles County provides court reporters, but there are major gaps such as the Long Beach area, where none are provided. Ventura County does not provide court reporters, but does electronically record misdemeanor trials.

There does not appear to be a correlation between the size of the county and the provision of court reporters. Colusa County with a population of 12,750, provides reporters in justice court criminal trials. Napa County with a population of 187,500, provides reporters to misdemeanor defendants. Alameda County with a population of 1,092,800, almost 100 times that of Colusa, and more than 5 times that of Napa, does not.

sel (Argersinger v. Hamlin (1972), 487 U.S. 425), to a change of venue (Groppi v. Wisconsin (1971), 404 U.S. 505), and whether an indigent misdemeanor defendant is entitled to a free transcript on appeal (Mayer v. City of Chicago (1971), 404 U.S. 189), this Court is the appropriate forum to decide whether a court reporter is constitutionally mandated for misdemeanor defendants under the Sixth Amendment and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In Mayer, this Court held that the State must provide an indigent misdemeanor defendant with a full verbatim transcript of his trial if necessary to afford him as adequate an appeal as a misdemeanor defendant with funds to pay his own way.

Because Mayer had a transcript available to him, this Court was not required to address the underlying issue of whether a state is required to provide a court

reporter at a misdemeanor trial so that there will be a transcript available on appeal. However, it is axiomatic that without a reporter there can be no transcript. Therefore it is implicit in Mayer that there must be a reporter to ensure the verbatim transcript.

On the other hand, if a court reporter is not required at a trial, then what alternatives are available to constitute a record of sufficient completeness? Does the clerk's transcript, or do statements reconstructed by counsel and the court provide adequate substitutes for full verbatim transcripts. And do these documents enable a reviewing court to fully consider the merits of an appeal? Who bears the responsibility of providing an adequate record at the trial and on appeal?

A resolution of these issues will have immediate import far beyond this

case. If court reporters at misdemeanor trials and the availability of transcripts for appeal are fundamental rights, then states will be put on notice that all misdemeanor defendants must receive these rights.

There is also the serious issue of whether prejudicial prosecutorial misconduct and constiutional errors occured at the trial, including whether this defendant was denied the right to the presumption of innocence during the trial.

Although Wrighting has served his term of confinement, he still sustains an injury: the presence of a misdemeanor conviction on his record and the collateral consequences of this conviction. He has paid fines in the sum of Four Hundred Forty Dollars ($440), which he respectfully requests be returned to him.

Although the trial has ended, the issues presented in this case continue.

This Court has recognized that if an underlying dispute is capable of repetition, yet continually evades review, it is not moot. Southern Pacific Terminal Company v. I.C.C. (1910). 219 U.S. 498, 515. It is reasonably probable that other misdemeanor defendants in California will continue to be denied court reporters and federally protected rights at their trials and on appeal, and that this issue will continue to evade review.

I.

A COURT REPORTER IS CONSTITUTIONALLY REQUIRED IN A MISDEMEANOR TRIAL.

A. A RECORD AT THE TRIAL IS A FUNDAMENTAL RIGHT.

The services of a court reporter in a criminal trial are a fundamental right, guaranteed by the Sixth Amendment and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Webster has defined the word record as coming from the "Middle English" and meaning:

> "Anything that is written down and preserved as evidence, accounts of events, anything that serves as evidence of an event; and
>
> An official written report of public proceedings, as in a legislature or court of law; documents preserved as evidence of proceedings, as of court." (5)

In modern trials, it is the court reporter who provides Webster's definition of a record. The stenographic reporter makes an accurate written account of what is transpiring at the trial, which serves as the record.

Without a reporter, there is no individual charged with the responsibility of recording in writing the testimony, evidentiary objections, and rulings of the court. The intense concentration required at a criminal trial precludes the court,

(5) New Twentieth Century Dictionary of the English Language. Webster's Unabridged Dictionary. Second Edition, 1968, p. 1508.

prosecutor, or defense counsel from functioning in a dual role as record keeper. Defense counsel, who is actively defending the accused, cannot keep copious notes as he is speaking or examining a witness. To require him to do so would diminish, if not destroy his capacity to provide effective assistance of counsel.

The right to a record at the trial is, simply stated, a right to a record of what is going on. Misdemeanor trials have become complicated factfinding processes, In a misdemeanor trial for driving under the influence of alcohol, witnesses can include, as they did in this case, the arresting officer, the officer who administered the field sobriety tests, the individual who drew the defendant's blood, the technician who performed the laboratory tests, a scientific expert to interpret the chemical anal-

ysis of the blood and to explain frequently complex testing machinery, and an expert physician. Defense witnesses may include the defendant, witnesses who were with him prior to or at the time of the incident, and rebuttal experts. In a criminal trial with numerous witnesses and complicated testimony, it is critical that a professional record taker be charged with the responsibility of documenting the testimony.

A professional record taker can be more important than the assistance of counsel at the trial. A defendant may elect to represent himself, or may have ineffective assistance of counsel. In such situations, the fact that there is a record of what transpired is more critical than the assistance of counsel which was either ineffective or non-existent. New appellate counsel would depend on a record of the trial to prepare an effective

appeal.

In this case, the California Court of Appeals has impliedly denied that a court reporter is a fundamental right, by citing a reference to a case which holds that court reporters are not required in misdemeanor trials. In denying Wrighting's petition for mandamus, the Court of Appeals referred to People v. Goudeau, (1970), 8 Cal.App.3d 275, in which the court stated that a misdemeanor defendant was not entitled to a reporter unless ordered by the trial court. Goudeau found that this proceedure did not discriminate against the poor, because the misdemeanor defendant was not required to pay the reporter's fees. (Id. at 280.)[6]

Goudeau's denial of fundamental rights to misdemeanor defendants is in direct conflict with this Court's decision in

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(6) Goudeau was tried in Long Beach, where no court reporters are provided in misdemeanor trials. Infra, page 17, . fn. 4.

Williams v. Oklahoma City (1969), 395 U.S. 458, and with this Court's subsequent decision in Mayer, supra, emphasizing that there can be no invidious distinctions in according fundamental rights.

According to Mayer, the denial of a free transcript on appeal when necessary to an indigent misdemeanant's appeal, is an invidious discrimination. It is therefore implicit that the denial of a court reporter at the trial to an indigent misdemeanant is equally as invidious.

If court reporters must be provided to indigents so that there will be transcripts available on appeal, then they must also be provided to non-indigents as well. There is always the possibility that a non-indigent trial defendant may become indigent on appeal. The test of indigency to warrant the provision of a free transcript on appeal is made at the time of the request for the

transcript. There is no scientific formula for predicting which trials will be appealed, or which non-indigents will become indigent on appeal. The Equal Protection Clause prohibits the denial of fundamental rights on an indigent/non-indigent basis. Therefore, a court reporter must be provided at all misdemeanor trials.

The use of a reporter at the trial and the availability of a transcript for appeal have become part of due process through custom and usage. They have become fundamental rights of a criminal defendant. Fundamental rights, even though not expressly guaranteed by the Constitution, have been recognized by this Court as indispensable to the enjoyment of rights explicitly defined. Richmond Newspapers, Inc. v. Virginia, supra.

However, Wrighting was denied his fundamental right to a record at the trial. The only record made at the trial is a skeletal clerk's transcript.(7)

As a matter of due process and equal protection, the state can and must provide a record of more sufficient completeness in a two day trial of a criminal matter in which a misdemeanor defendant could have been and was punished by loss of liberty and a fine.

The state has control over the mechanisms of the criminal justice system, supervises the court, and provides

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(7) The sufficiency of the clerk's transcript as a "record" is questionable. A verbatim account of the challenged events of the second day of trial illustrates the problem.

> "Argued to the jury by Defense Counsel Sylvia Prozan.
> Closing Argument by D.A. Margaret Ong.
> Court orally instructed the jury on the Matter.
> Marshall Joe Davis sworn to take Charge of the Jury.

the apparatus for a criminal trial. It is the state which must be charged with the responsibility of providing a proper objective record for the trial and on appeal.

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(7) (Con't.)

"Started deliberating at 10:55 A.M. returned with Verdict at 3:35 P.M."

(R. 20.)

B. WRIGHTING WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS AT THE TRIAL BECAUSE OF THE COURT'S REFUSAL TO PROVIDE A COURT REPORTER WHICH IS DISCRETIONARY UNDER CCP 274(c).

In California, a felony defendant is entitled to a court reporter on request. (California Code of Civil Procedure 269. Appendix E.) A juvenile defendant has the right to have his hearing transcribed. (Welfare and Institutions Code 677. Appendix E.) A civil litigant in Superior Court (California Code of Civil Procedure 269) and Municipal Court (CCP 274(c)) is entitled to a court reporter on request. Only the municipal court criminal defendant must obtain a court order before receiving a court reporter at his trial.(8)

CCP 274(c) is in direct conflict with constitutional guarantees. The Equal

(8) According to California Penal Code 1462 (Appendix E), the Municipal Court has jurisdiction in misdemeanor criminal cases.

Protection Clause of the Fourteenth Amendment directs that a state may not deny to any person within its jurisdiction the equal protection of the laws. And yet when CCP 274(c) provides that the civil litigant in a municipal court may have a court reporter on request, but that the criminal defendant may not, it is denying the equal protection of the laws to the latter.

Under traditional equal protection analysis, a statute must be sustained as constitutional unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. Frontiero v. Richardson (1973), 411 U.S. 677, 683.

There is serious doubt about the legitimacy of denying procedural rights to that class of individuals which may be confined to prison for a year, or fined large sums of money, or both, while

granting greater rights to the class of individuals litigating in the same municipal courtrooms on civil matters.

Financial savings may be tendered as a legitimate state purpose. However it is the state which is prosecuting the defendant and must accord him every procedural protection. Any financial savings is minimal in relation to the overall costs of prosecuting the accused. Financial savings cannot justify an otherwise unconstitutional state statute. Shapiro v. Thompson (1968), 394 U.S. 618.

As Mr. Chief Justice Burger wrote in his concurring opinion in Mayer:

> "An affluent society ought not be miserly in support of justice for economy is not an objective of the system." (Id. at 201.)

In the second equal protection analysis, when a challenged statute interferes with fundamental rights, a different standard of judicial review is applied. The statute is subject to rigor-

ous judicial scrutiny, and it is the state which bears the burden of establishing a compelling state interest which justifies the denial of a fundamental right.

The right to a record of proceedings at a criminal trial, and the right to a verbatim transcript of those proceedings when essential to an appeal are fundamental rights. It is this second analysis which must be applied to CCP 274(c).

In Griffin v. Illinois (1956), 351 U.S. 12, which Mr. Justice Brennan has described as "the watershed of our transcript decisions," (Mayer, supra, at 193), this Court wrote that:

> "Constitutional guaranties of due process and equal protection both . . . call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons." (Id. at 17.)

But there is an invidious discrim-

ination against the group of criminal defendants in municipal courts who are denied the right to a court reporter at their trials. There is no fundamental justice when a misdemeanor defendant tried in the municipal courtrooms of Alameda County does not have a court reporter, while a misdemeanor defendant accused of the same crime a few miles away in San Francisco or San Mateo Counties receives a reporter.

The kind of justice a misdemeanor defendant receives should not depend on the whim of the court in which he is tried, or the fortuity of where he has been apprehended. All misdemeanor defendants must be accorded fundamental rights on an equal basis.

Because California law provides court reporters for felons and juvenile defendants on request, but denies reporters on request to misdemeanor defendants,

there is an additional violation of fundamental rights.

There is no compelling state interest to justify the distinction between rights accorded to felony and juvenile defendants and denied to misdemeanor defendants in the same county or the same state.

California has defined a felony as: "A crime which is punishable with death or by imprisonment in the state prison." (California Penal Code 17. Appendix E.) California defines a misdemeanor as: "Every other crime or public offense . . . except those offenses that are classified as infractions." (California Penal Code 17.) There is nothing inherent in the definition of these offenses which would justify a distinction in procedural rights accorded to either category.

The difference in punishment cannot justify the distinction in treatment. The

accused felon in Alameda County may be acquitted with a court reporter present. The misdemeanor defendant may be convicted, fined, and incarcerated without a reporter, as this defendant was.

The Sixth Amendment does not discriminate between different classes of criminal defendants, but states that in all criminal trials, the accused shall enjoy certain basic rights. California Code of Civil Procedure 274(c) denies the misdemeanor defendant those rights and cannot withstand constitutional scrutiny.

C. THE DENIAL OF A COURT REPORTER IMPOSED AN UNREASONED DISTINCTION ON THIS MISDEMEANOR APPELLANT'S OPEN AND EQUAL ACCESS TO THE COURTS OF APPEAL.

Although States are not required to provide appellate review, once established, these avenues must be kept free

of unreasoned distinctions that can only impede open and equal access to the courts of appeal. Rinaldi v. Yeager, (1966), 384 U.S. 305.

The arbitrary denial of a court reporter under CCP 274(c) imposed an unreasoned distinction on Wrighting's open and equal access to the courts of appeal. He did not have a transcript, or its equivalent, for appeal.

A transcript on appeal is a fundamental right. The significance which this Court accords to transcripts on appeal has been made clear in Griffin , supra, and in the line of cases decided thereafter. Transcripts are "the instrument needed to vindicate legal rights." Roberts v. LaVallee (1967), 389 U.S. 40.

When an appeal focuses on prejudicial error, it is the reporter's transcript of what transpired at the trial which becomes the linchpin of the appeal.

The transcript is critical because appeals are heard before different tribunals a substantial period of time after the conclusion of the trial. The reviewing court depends upon the record to determine the merits of an appeal.

Justice Brennan suggested in Mayer, supra, that Mayer's claim of prosecutorial misconduct was the sort of claim that required provision of a verbatim transcript. (Id. at 198.) The prejudicial prosecutorial misconduct in this case is similarly the kind of claim that requires a verbatim transcript.

But Wrighting does not have a verbatim transcript available of his trial. He does not have the record of sufficient completeness mandated for the indigent in Mayer, and impliedly mandated for the non-indigent as well. He was denied the equal access of those California misdemeanor, felony, juvenile, and civil appellants

who have been provided with reporters at their trials.

California has recognized the importance of a record on appeal from a felony conviction. When a felony appellant claimed prosecutorial misconduct in closing argument, and when the loss of the reporter's notes precluded the reviewing court from fully considering the merits of the appeal, the conviction was vacated. People v. Apalatequi (1978), 82 Cal. App.3d 970.

In an appeal of the conviction of a juvenile, when the reporter's notes were lost, the conviction was vacated. In Re Steven B. (1979), 25 Cal.3d 1.

In a case which followed Mayer, supra, the California Supreme Court held that indigent misdemeanor defendants were entitled to free transcripts on appeal once they had demonstrated the need for a complete transcript. March v.

Municipal Court (1972), 7 Cal.3d 422, was an appeal from a conviction in San Francisco Municipal Court. Since San Francisco is one of the California counties which provides court reporters, there was a transcript available on appeal.

Only the rights of the California misdemeanor defendant to receive a court reporter at the trial remain shrouded in pre-Mayer law which has no current vitality.

There can be no distinction on appeal between felony and juvenile defendants whose convictions were vacated because court reporters' notes were lost, and a misdemeanor defendant who had nothing to lose because he was denied his basic tools at the trial.

The failure to have a transcript on appeal denies the misdemeanor defendant his right to the assistance of counsel.

Without a transcript, and unable to reconstruct a verbatim document from memory, counsel cannot render effective assistance. As Mr. Justice Marshall recognized in Britt v. North Carolina (1971), 404 U.S. 226,

> "We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory, or keep exhaustive notes of the testimony at the trial."(Id. at 229.)

II.

WRIGHTING'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AT THE TRIAL BY PREJUDICIAL PROSECUTORIAL MISCONDUCT AND OTHER CONSTITUTIONAL ERRORS.

Wrighting's fundamental rights were denied by prejudicial prosecutorial misconduct and other constitutionally impermissible errors at the trial which render his conviction void.

The prosecutor's repeated attacks

on the defendant's presumption of innocence during defense counsel's closing argument, which were upheld by the court, constitute reversible error.

The prosecutor and court brought constitutionally improper inferences before the jury. At the time of defense counsel's closing argument, the defendant was still presumed innocent and the trial was not yet over.

This court held unequivocally in Powell v. Alabama (1932), 237 U.S. 45:

> "However guilty defendants upon due inquiry might prove to have been, they were, until convicted by the jury, presumed to be innocent." (Id. at 52.)

In Richmond Newspapers, Inc. v.Virginia, supra, Mr. Chief Justice Burger reaffirmed that certain unarticulated rights, including the right to be presumed innocent,

> " . . . have been found to share constitutional protection in common with explicit guarantees."

Mr. Justice Stewart wrote in Herring v. New York (1975), 422 U.S. 853, 858, that closing argument for the defense is an essential element in a criminal trial, and that:

> " . . . (N)o aspect of such advocacy could be more important than the opportunity finally to marshall the evidence for each side before submission of the case to judgment." (Id. at 862.)

However, this defendant was denied the presumption of innocence during the trial and before conviction, and he was denied the opportunity to marshall the evidence and persuade the jury. Nothing defense counsel said thereafter could have reversed the inequity of stripping the defendant of this right to the presumption of innocence at the very time he was trying to persuade the jury of that innocence.

The combined errors of the prosecutor and the court nullified the defen-

dant's right to final argument, deprived the defendant of the assistance of counsel, and deprived the defendant of his right to a jury determination.

Prejudicially influenced by the court and prosecutor, the jury could reasonably have believed as it was told: that the defendant was no longer presumed innocent and that the trial was over. The jury could have concluded that the defendant was then guilty, and interpreted its function as that of a rubber stamp, to affirm the edicts of the court and prosecutor.

The prejudicial actions of the prosecutor and the court threatened the jury's ability to determine the truth in this case.

> "Any practice that threatens the jury's ability properly to perform that function (of determining the truth) poses a similar threat to the truth-determining process itself." Brown v. State of Louisiana, (1980). ___U.S. ____ (No. 79-5364.) (Deci-

ded June 16, 1980.)

The comments of the prosecutor and court constitute reversible error. Absent the constitutionally forbidden comments, hones, fair-minded jurors might very well have brought in a not-guilty verdict. Chapman v. State of California (1967), 386 U.S. 18, 25-26.

Had a court reporter been present, the invidious language of the prosecutor's objections, which counsel cannot reconstruct from memory, would have been preserved. The presence of a reporter would have served another function: as a deterrent, and as a restraint on the possible abuse of judicial and prosecutorial actions. When a professional record taker is present to document actions and words, care is taken that actions and words do not violate fundamental rights of the accused.

Additional errors occured at the

trial. There were three sets of jury instructions, and no record of what had been instructed to the jury on any occasion. The fact that the jury had to ask for reinstruction and then xeroxed instructions indicates that they were confused about their function and about the law.

There is no record of what transpired during the court's improvisation during the second set of jury instructions. This Court cannot select between competing accounts of what transpired; there is no record and no way to resolve the disputes.

The defendant has been severely handicapped. The trial itself was fundamentally unfair. There may have been other prejudicial errors which the defendant cannot document because there was no record taker at the trial, and no transcript with which he could substantiate the errors.

The Sixth Amendment mandates a public trial. Although the doors to the courthouse may not have been locked on December 6 and 7, 1977, they have been effectively bolted shut ever since. It is as impossible to ascertain what happened at this trial as it is to find out what happened at a secret trial. The key to the lock, the transcript, was never forged.

Although Wrighting's terms have been served, the collateral consequences of his conviction remain. Subsequent convictions may carry heavier penalties for Wrighting. United States v. Morgan (1953), 346 U.S. 502. He may suffer difficulties in finding new employment or encounter other problems because of this conviction. He is entitled to an opportunity to show that this conviction was invalid so that the slate can be wiped clean. Additionally, he has paid the sum of Four Hundred Forty Dollars

($440) in fines, which he requests be returned to him.

III.

THE CALIFORNIA RULES IMPOSE UNREASONED DISTINCTIONS ON MISDEMEANOR APPELLANTS.

The California Rules on Appeal impose two different standards of review, one for felony appeals, and another for misdemeanor appeals.

The rights of a misdemeanor defendant to appeal of his case cease at the level of the Appellate Department of the Superior Court of the same county in

which that defendant was tried.

According to California Rule of Court 62 (Rules on Transfer of Municipal and Justice Court Appeals, Appendix E.), there is no further appeal of a criminal case in the original jurisdiction of a municipal or justice court, unless the superior court certifies the case for transfer,or unless the Court of Appeal determines from an opinion of the Appellate Department published or to be published, that the case warrants further review. California Rule of Court 63 (Appendix E),permits a party to apply for certification.

Wrighting's rights to further appellate review were aborted when the Appellate Department neither wrote nor published an opinion in this case, and when the Appellate Department failed to certify, and refused Wrighting's request for certification to the Court of Appeal.

California Rule of Court 62 imposes an unreasoned distinction upon the right of a misdemeanor appellant to further review by predicating that right upon the action of the lower court.

On the other hand, in felony appeals, it is the defendant who has the right to seek further review of his case from the next highest court (District Court of Appeal, and thereafter Supreme Court of California), and it is the next highest court which has a right to determine whether a particular case warrants further appellate review.(9)

In California misdemeanor appeals, it is the lower court, not the defendant, which makes the decision of whether higher review will be sought. By failing to write and publish an opinion, the Appellate Department was able to preclude the

---

(9) Rule 1 and Rule 28 et seq. of the California Rules of Court apply to felony appeals. (Appendix E.)

District Court of Appeal from rendering further review on appeal in this case.

Other unreasoned distinctions impede the rights of California misdemeanor appellants. The Rules governing settled statements are inadequate. When a misdemeanor defendant is denied a court reporter at the trial, he is forced to rely on a settled statement as his only record on appeal. The Rules should therefore provide for all of the foreseeable contingencies which can arise when three parties (court, prosecutor, and defense counsel) are obligated to reconstruct what transpired at a criminal trial in a settled statement.

California Rules of Court do not. Rule 187 fails to provide for the most obvious problem: what transpires when the parties cannot resolve conflicts as to what happened at the trial. (10)

(10) Other states recognize and have dealt with this problem. For instance, in Wis-

The use of a settled statement as the sole record on appeal, without the backup alternative of a transcript, or a court reporter's untranscribed notes, must be brought into serious scrutiny.

The settled statement is not a substitute for a transcript, nor is it a verbatim documented account of what transpired. It is merely each individual's recollection of what the individual perceived as happening at the trial.

There is the potential that the trial court's belief or memory of what may or may not have transpired will serve as a substitute for what actually transpired. It is a denial of fundamental rights to require a misdemeanor defendant to proceed on appeal with an approximation

---

(10)(Con't.)
consin, misdemeanor appeals are heard by the circuit court where there is a trial de novo, because Milwaukee County does not provide court reporters. Murphy v. Voss (1967), 149 N.W.2d 595.

or a recollection as to what transpired, when verbatim transcripts are available to other misdemeanor, felony, and juvenile defendants.

The difficulties in proceeding with a settled statement for appeal may act as a deterrent to misdemeanor appeals when there has been no court reporter. A proposed statement must be prepared by each side and settled in a hearing by the trial court. Memories may grow dim and conflicts remain unresolved.

Knowing the difficulties and potentially futile outcome of having an inadequate record for appeal, misdemeanor defendants may be discouraged from pursuing an appeal of their convictions.

Providing a court reporter at the trial is the most fundamentally fair, accurate, and economical in terms of court and attorney time, of ensuring an adequate record for appeal.

In Eskridge v. Washington State Board of Prisons (1958), 357 U.S. 214, 216, this Court found that the conclusions of the trial judge that there had been no reversible error at the trial could not be an adequate substitute for the right to a full appellate review available to all defendants in Washington who could afford the expense of a transcript.

In this case, the unilateral statement by the trial judge of what transpired below is not an adequate substitue for the full appellate review available to those misdemeanor defendants in California who have been provided with court reporters at their trials, and to all felony and juvenile defendants.

IV.

THE ISSUE OF WHETHER A MISDEMEANOR DEFENDANT RECEIVES A COURT REPORTER IS UNSETTLED IN OTHER STATES.

Confusion and conflict exists among other states on the issue of whether a misdemeanor defendant is entitled to a court reporter.

In Texas, the court is required to appoint a reporter at the request of the misdemeanor defendant. Cartwright v. Texas, (1975), 527 S.W.2d 535.

However, the Supreme Court of Louisiana held that it was an unconstitutional restriction on a misdemeanor defendant's right of judicial review to require him to make the request for a reporter before a reporter would record his trial. State v. LeBlanc (1979), 367 So.2d 335.

But in Walker v. State (1980), 264 S.E.2d 567, the Georgia Court of

Appeal affirmed the conviction of a misdemeanor defendant, holding that it was due to the defendant's inaction in failing to request a reporter that she was without a transcript for appeal.

In Wisconsin, some misdemeanor defendants do not have reporters at their trials. Misdemeanor appeals are heard in the circuit court where there is a trial de novo, so that a record will be made in the event the case is appealed to the Wisconsin Supreme Court. Murphy v. Voss, supra.

Across the state border in Illinois, Jack Mayer had a record of his misdemeanor trial in Cook County (Mayer, supra). However, when there was no transcript of a misdemeanor guilty plea in Winnebago County, the Illinois Appellate Court held that that defect did not reach constitutional dimensions. People v. Grundset,

(1978), 380 N.W.2d 1056.

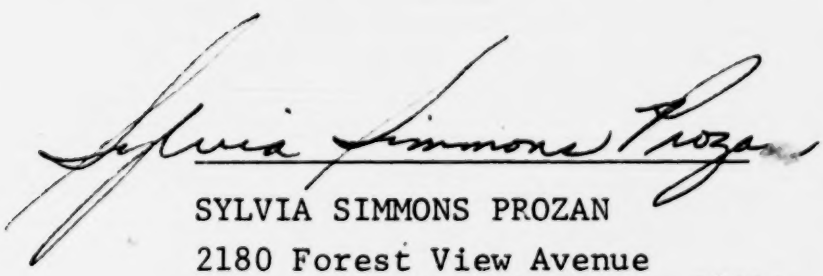
This troublesome patchwork of rights denied, qualified, or granted, is remedied by providing all misdemeanor criminal defendants with the same fundamental right: a court reporter at the trial, and all of its stages, and the availability of a transcript for appeal.

A court reporter is a basic, critical right, whose value extends to the entire system of criminal justice. A record at the trial assists the court, prosecutor and the jury, as well as the defendant, in the conduct of the trial. The transcript ensures a proper consideration of the issues on appeal. The verbatim record satisfies the appearance of justice, strenthens society's criminal processes, and affirms the right to a public trial.

CONCLUSION

For the reasons stated herein, this Court should issue its writ of certiorari to the Court of Appeal, First Appellate District, State of California, to review the judgment and conviction of Edward Wrighting.

Respectfully submitted,



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Telephone: (415) 343-3921

Counsel for Petitioner

July 31, 1980.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,

Petitioner,

vs.

COURT OF APPEAL

FIRST APPELLATE DISTRICT

STATE OF CALIFORNIA,

Respondent

A P P E N D I X T O:

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

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94010
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Counsel for Petitioner

APPENDIX A

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION FOUR

Edward Wrighting, Jr., Petitioner, vs. Appellate Department of the Superior Court of Alameda County, Respondent, People of the State of California Real Party in Interest	No.49022 Alameda Superior Court No. 1207

BY THE COURT;

The petition for writ of mandate is denied. (See People v. Goudeau, 8 Cal.App.3d 275.)

Dated: April 10, 1980.

s/s P.J.

CALDECOTT, P.J.

Filed April 10, 1980
Court of Appeal -First App. Dist.
CLIFFORD C. PORTER, Clerk

APPENDIX B

SUPREME COURT, STATE OF CALIFORNIA

May 8, 1980.

I have this day filed Order:

Hearing Denied.

In re: 1 Civ. No. 49022

Edward Wrighting, Jr.,

vs.

Appellate Dept., Superior Court,

Alameda.

Respectfully,

Clerk

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

January 31, 1980
Hon. RICHARD A. BANCROFT, P.J.
Hon. ROBERT J. BARBER, J.
Hon. STANLEY P. GOLDE, J.

Nanci E. Alvarez,
Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EDWARD WRIGHITNG, JR.,
Defendant and Appellant

NATURE OF PROCEEDINGS: APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEAL

ACTION NO. 1207.

In the above entitled action, the Court having rendered judgment on January 16, 1980, and the appellant having submitted an application for Certification to the Court of Appeal filed on January 21, 1980, and the court having taken under

APPENDIX C - Continued

and fully considered said request now orders: Application for Certification to the Court of Appeal denied.

A copy of the above minute order mailed this date to:

D. Lowell Jensen, D.A.
Ralph Countryman, D.D.A.
1225 Fallon Street
Oakland, California 94612

Sylvia Simmons Prozan
2180 Forest View Avenue
Hillsborough, California 94010

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

January 16, 1980
Hon. RICHARD A. BANCROFT, P.J.
Hon. ROBERT K. BARBER, J.
Hon. STANLEY P. GOLDE, J.

Nanci E. Alvarez,
Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EWARD WRIGHTING, JR.,

Defendant and Appellant

NATURE OF PROCEEDINGS: APPEAL

ACTION NO. 1207

In the above entitled action, having been heretofore argued and submitted on the briefs on April 20, 1979, comes now the Court and orders: Request for further certification denied and the judgment on appeal is hereby affirmed. Remittitur to issue.

APPENDIX D - Continued

A copy of the above minute order mailed this date to:

D. Lowell Jensen, D.A.
Ralph Countryman, D.D.A.
1225 Fallon Street
Oakland, California 94612

Sylvia Simmons Prozan
2180 Forest View Avenue
Hillsborough, California 94010

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE 269:

The official reporter of a superior court, or any of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for the defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must within such reasonable time of the trial of such case as the court may designate, write out the same, or such

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE 269 (Continued):

specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reporter and transcribed, and when directed by the court, file the same with the clerk of the court.

CALIFORNIA PENAL CODE 17:

(Felony; misdemeanor; classification of offenses):

(a) A felony is a crime which is punishable with death or imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

APPENDIX E

CALIFORNIA PENAL CODE 1462:

Each municipal and justice court shall have jurisdiction in all criminal cases amounting to misdemeanor, where the offense charged was committed within the county in which such municipal or justice court is established except those of which the juvenile court is given jurisdiction and those of which other courts are given exclusive jurisdiction. ***

CALIFORNIA RULE OF COURT 1:

An appeal from a judgment of a superior court or from a particular part thereof is taken by filing with the clerk of that court a notice of appeal therefrom. ***

CALIFORNIA RULE OF COURT 28:

(a) Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its

APPENDIX E

CALIFORNIA RULE OF COURT 28 (Continued):

own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision.***

(b) A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court . .

****

CALIFORNIA RULE OF COURT 62

(Rules on Transfer of Municipal and Justice Court Appeals):

A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or

APPENDIX E

CALIFORNIA RULE OF COURT 62 (Continued):

to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. ***

CALIFORNIA RULE OF COURT 63:

The superior court on application of a party or on its own motion may certify that the transfer of a case appears necessary to secure uniformity of decision or to settle important questions of law ***

CALIFORNIA RULE OF COURT 187:

(Settlement of Statement or Transcript) Upon the filing of such proposed amendments or upon the expiration of the time therefor without the filing thereof, the trial judge shall forthwith fix a time for settlement of the statement or transcript, or both, which time shall

APPENDIX E

CALIFORNIA RULE OF COURT 187 (Continued):

be as early as the business of the court will permit, either in chambers or in open court, and cause notice thereof to be mailed, at least five days before the time fixed, to each party, or, if any party appears by attorney, then to his attorney, if the mailing address of such party or attorney appears in the case in which the appeal is taken. The trial judge shall at the time fixed, or any other time to which the matter may be continued, settle the statement or transcript, or both, and the amendments proposed thereto, if any, correcting, altering, or rewriting such statement or transcript, or both, as may be necessary to make the same set forth fairly and truly the evidence and proceedings relating to the specified grounds of appeal or the matters set forth by the appellant in support thereof.

APPENDIX E

CALIFORNIA RULE OF COURT 187 (Continued):

The appellant's specifications of grounds of appeal shall not in any case be eliminated from the settled statement. At the time of settlement the judge may direct the appellant to engross the statement or transcript or both, as settled. Thereupon the appellant shall engross the statement or transcript, or both, as corrected and settled and present the same to the judge for certification within five days from the date of settlement, and if he fails to do so within said period or any lawful extension thereof his right to have such statement or transcript settled or certified shall thereupon terminate. When a statement or transcript is settled, and engrossed if engrossment is ordered, the trial judge shall certify to its correctness. A judge may settle and certify such state-

APPENDIX E

CALIFORNIA RULE OF COURT 187 (Continued):

ment or transcript after as well as before he ceases to be such judge. If the trial judge dies, is removed from office, becomes disqualified or is absent from the state at the time for settling or certifying a statement or transcript, it may be settled or certified by any other such judge of said court qualified to act.

CALIFORNIA VEHICLE CODE 23102:

(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway.

* * *

(d) Any person convicted of an offense under this section within five years of a prior conviction under this section or Section 23105 shall be punished by

APPENDIX E

CALIFORNIA VEHICLE CODE 23102 (Continued):

imprisonment in the county jail for not less than 48 hours nor more than one year and by a fine of not less than two hundred seventy-five dollars ($275) nor more than one thousand dollars ($1000).***

CALIFORNIA WELFARE AND INSTITUTIONS CODE 677: (Court reporter; writing out and transcribing notes; costs):

At any juvenile court hearing conducted by a juvenile court judge, an official court reporter shall, and at any such hearing conducted by a juvenile court referee, the official reporter, as directed by the court, may take down in shorthand all the testimony and all of the statements and remarks of the judge and all persons appearing at the hearing; and if directed by the judge, or requested by the person on whose behalf the petition was brought, or by his parent or

APPENDIX E:

CALIFORNIA WELFARE AND INSTITUTIONS CODE 677(Continued):

legal guardian, or the attorneys of such persons, he must, within such reasonable time after the hearing of the petition as the court may designate, write out the same or such specific portions thereof as may be requested in plain and legible longhand or by typewriter or other printing machine and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court. Unless otherwise directed by the judge, the costs of writing out and transcribing all or any portion of the reporter's shorthand notes shall be paid in advance at the rates fixed for transcriptions in a civil action by the person requesting the same.

Supreme Court, U. S.
FILED
NOV 1 1980
MICHAEL RODAK, JR., CLERK

No. 80-167

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
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ROBERT R. GRANUCCI
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether a petition for writ of certiorari is timely when it was filed more than six months after the Alameda County Superior Court, Appellate Department, denied an application for certification to the California Court of Appeal, which denial marked the end of petitioner's appellate rights.

2. Whether denial of a court reporter at a misdemeanor jury trial violates some federal right when an alternate method of providing an appellate record is available, and was used, and when indigent and non-indigent defendants are treated alike.

3. Whether any federal right was infringed by prosecutorial misconduct.

4. Whether the California system of appeal from a misdemeanor conviction violates a federal right, when a meaningful right to

appeal exists, and when indigent and nonindigent defendants are treated alike.

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No. 80-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are two separate actions involved. First is the criminal proceeding which began in the Municipal Court of California, County of Alameda. Petitioner's conviction in that case was affirmed in an unreported opinion of the California Superior Court, County of Alameda, Appellate Division, on January 16, 1980. Petition, Appendix D.

The Appellate Department denied an application for certification to the Court of Appeal on January 31, 1980. Petition, Appendix C. This was the court of last resort for petitioner in that matter. See the Argument, below.

The second action was a civil writ of mandate challenging the criminal conviction commenced by petitioner in the California Court of Appeal, First Appellate District, Division Four. This was denied in an unreported opinion on April 10, 1980. Petition, Appendix A. The California Supreme Court denied hearing on May 8, 1980. Petition, Appendix B.

JURISDICTION

The petition was not timely filed. Jurisdiction is invoked under 28 U.S.C. 1257(3). However, petitioner had exhausted all appellate rights when certification to the Court of Appeal was denied on January 31,

1980. This was the court of last resort for petitioner in the criminal matter. This will be discussed further in the Argument, below.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions, statutes, and rules involved are set forth in the petition.

STATEMENT OF THE CASE

On September 14, 1976, petitioner was charged in the Alameda County Municipal Court with violation of California Vehicle Code section 23102(a), driving under the influence of alcohol, a misdemeanor. Petition, page 4. Petitioner's motion to have a court reporter at the trial was denied. Petition, page 5. Jury trial was held on December 6 and 7, 1977, resulting in a guilty verdict. Petition, pages 5, 9. Petitioner appealed, and each party filed a proposed settled statement. Thereafter, on

September 7, 1978, the trial court filed a settled statement. Petition, page 9. On January 6, 1980, the Alameda County Superior Court, Appellate Department, affirmed the conviction. Petition, page 11. The Appellate Department denied an application to have the case transferred to the California Court of Appeal on January 31, 1980. Petition, pages 11-12. This exhausted petitioner's appellate rights. Petition, page 12; see also below.

Petitioner commenced the second action by filing a petition for a writ of mandate in the California Court of Appeal. This was denied on April 10, 1980. Petition, Appendix A. The California Supreme Court denied hearing on May 8, 1980. Petition, Appendix, B. The instant petition followed.

The facts concerning the alleged misconduct will be discussed in the Argument, below.

REASONS FOR DENYING THE WRIT

A. Timeliness of the Petition

When petitioner's application to have the case transferred to the court of appeal was denied on January 31, 1980, the appellate division of the court of appeal became the court of last resort for petitioner. Talley v. California (1960) 362 U.S. 60, 62; Whittaker v. Superior Court (1968) 68 Cal.2d 357, 365, 438 P.2d 358, 66 Cal.Rptr. 710; Burrus v. Municipal Court (1973) 36 Cal.App.3d 233, 238, 111 Cal.Rptr. 539; California Rules of Court, Rule 62. Thus petitioner was required to file the petition within 90 days of that date. He did not. Rules of the Supreme Court, Rule 20.1. Petitioner attempted to create a state appellate right where none existed by filing a collateral civil mandamus petition challenging his conviction in the higher appellate courts. The denial of these

discretionary writs should not reconfer on this Court a jurisdiction which had already expired.

Petitioner contends the California appellate procedure for misdemeanor convictions is inadequate. This meritless contention will be discussed below. However, even were this so, the fact remains that this petition is untimely. A federal question may have been involved concerning the validity of the California appellate procedure, if the petition had been timely filed; no federal question is involved in the denial of a discretionary civil writ.

B. The Merits

The rulings in this case do not conflict with any decisions of this Court or of any other court that we are aware of, nor is any substantial federal question involved. This is because there exists in California adequate review in misdemeanor convictions

and, more to the point, no unequal treatment based on indigency.

1. The absence of a court reporter

In People v. Goudeau (1970) 8 Cal.App.3d 275, 87 Cal.Rptr. 424, the court considered the validity of having no court reporter in misdemeanor cases in light of Williams v. Oklahoma City (1969) 395 U.S. 458; and Griffin v. Illinois (1956) 351 U.S. 12. The court correctly found that the "wealth of the defendant is . . . not relevant to the presence of a reporter . . . ." People v. Goudeau, 8 Cal.App.3d at 280. The court also found the use of a settled statement provided an adequate alternative to the use of a reporter's transcript. 8 Cal.App.3d at 280-282. This state court interpretation of state law should be given careful consideration. Reitman v. Mulkey (1967) 387 U.S. 369, 376-379. Because of this the court

properly distinguished the two decisions of this Court referred to previously and found no federal right was violated. Recently the California Supreme Court also impliedly approved this system. In re Kathy P. (1979) 25 Cal.3d 91, 102, 599 P.2d 65, 157 Cal.Rptr. 874.

The line of cases primarily relied upon by petitioner were concerned with differing treatment based upon wealth. E.g., Mayer v. City of Chicago (1971) 404 U.S. 189, 195:

> "[T]he State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way."

Here a non-indigent, such as petitioner, and an indigent are treated exactly alike.

Petitioner engages in a classic piece of circular reasoning on this point. He argues that this Court in Mayer required indigents have certain transcripts because non-indigents could have them. Thus, he argues, in California the non-indigent must have the transcripts because indigents are required under Mayer to have them. Petition, pages 26-27. In reality, this Court requires only that there be no discrimination between rich and poor. Here there is none.

2. The alleged misconduct

Petitioner exaggerates the inconsistancies between the proposed settled statements of the parties, and the settled statement prepared by the court. During defense closing argument the defense argued he was presumed innocent. The district attorney objected, stating the defendant was no longer presumed innocent because the trial was over. The court upheld this, stating to

defense counsel: "Counsel, you are misstating the law." There was further discussion about this. See the two proposed settled statements and the settled statement.

One may well ask, if the defendant is still presumed innocent after all the evidence has been presented to the jury, when is the prosecution ever going to overcome the presumption. The defendant is presumed innocent when the trial began. At some point during the giving of evidence the presumption must be overcome if the prosecution is to prevail. But such semantic quibbles do not constitute a federal question. The jury knew the defendant was presumed innocent at the beginning of trial. The defense was entitled to argue the presumption had not been overcome; the prosecution that it had been. This was clear to the jury. Compare Donnelly v. DeChristoforo (1974) 416 U.S. 637, 646-647.

3. Misdemeanor appeals

In California a convicted misdemeanant has a right to appeal to the appellate department of the superior court. There is further appellate review only if the appellate department certifies the matter. Whittaker v. Superior Court, supra, 68 Cal.2d at 365; California Rules of Court, Rules 62, 63. Petitioner claims this is unconstitutional.

It is settled that there is no federal constitutional right to state appellate review of state criminal convictions. Griffin v. Illinois, supra, 351 U.S. at 18; Rinaldi v. Yeager (1966) 384 U.S. 305, 310; Ross v. Moffitt (1974) 417 U.S. 600, 611. Petitioner claims however, that the distinction drawn between those charged with misdemeanors and those charged with more serious felonies violates a federal right. However, a state may constitutionally provide

more favorable appellate procedures for those facing more serious punishment than it provides those facing less serious punishment. Estelle v. Dorrough (1975) 420 U.S. 534, 539-540. The California system of limited appellate review of misdemeanor cases does not violate any federal right.

CONCLUSION

For the reasons stated, the People of the State of California respectfully request that this Court deny the petition.

DATED: October 27, 1980

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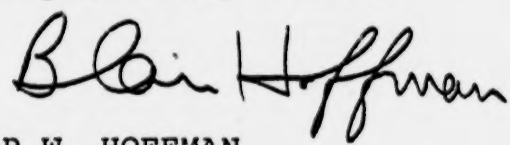

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No. 80 - 167

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY MEMORANDUM

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QUESTION PRESENTED

Whether a petition for certiorari is properly before this Court, when a petitioner has exhausted all state remedies by exercising his discretionary state right to further review by commencing extraordinary writs with the Court of Appeal and the California Supreme Court; and when a petition for certiorari is thereafter filed within ninety days after denial of the extraordinary writ by the California Supreme Court?

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PETITIONER'S REPLY MEMORANDUM

This reply brief is addressed only to the issue of the timeliness of the Petition for Certiorari, and to the jurisdiction of this Court to grant the Petition, which was raised for the first time in the respondent's brief.

A. California Procedures For Appellate And Discretionary Review Were Correctly Followed By Petitioner.

Before petitioning this Court for Certiorari, Petitioner correctly exhausted all state remedies available to him.

Respondent has incorrectly represented California procedure. Although the right to appellate review ends at the level of the Appellate Department of the Superior Court for cases originating in municipal or justice courts, thereafter the appellant has the discretionary right to petition a higher court by means of an extraordinary writ.

The use of the extraordinary writ is not mandatory. However, because the right of discretionary review by higher courts exists, this petitioner followed that course.

According to the California Constitution, Article 6, Section 10:

"The Supreme Court, courts of appeal

> . . . have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

In Green v. Superior Court (1974) 10 Cal.3d 616, and in East Bay Municipal Utility District v. Appellate Department of Alameda County (1979), 23 Cal.3d 839, both petitioners successfully petitioned higher courts for discretionary extraordinary relief after their rights of appeal had ended at the level of the Superior Court.

East Bay Municipal Utility District originated in the municipal court. After the Appellate Department of Alameda County affirmed the judgment below and petitioner had no further right of appeal, a writ of mandamus was filed in the higher courts, and the Supreme Court of California granted review (certiorari). 23 Cal.3d 839, 841-

842, fn. 3 at 842.

Green v. Superior Court originated in small claims court. Green's rights of appeal ended after a trial de novo in the Superior Court of San Francisco. Thereafter he filed a petition for mandamus or prohibition with the District Court of Appeal. The Court of Appeal denied the writ, and Green subsequently petitioned the California Supreme Court for review (certiorari), which was granted. 10 Cal.3d 616, 621-622, fn. 6 at 622.

Therefore, California state law does permit the discretionary use of the extraordinary writ in cases such as the petitioner's, after the right of appeal has ended at the level of the Superior Court or the Appellate Department of the Superior Court. California Code of Civil Procedure 1086.

The respondent's assertion that the

appellate department of the Superior Court was the court of last resort for the petitioner is clearly flawed.

Green and East Bay Municipal Utility District represent the correct procedure under California law. Neither Whittaker v. Superior Court (1968), 68 Cal.2d 357, Burrus v. Municipal Court (1973), 36 Cal.App.3d 233, nor California Rule of Court 62 (all cited by respondent, at brief, p.5) preclude a petitioner from exercising his right to discretionary review by filing an extraordinary writ after the petitioner's rights of appeal have ended with the Superior Court, or with the Appellate Department of the Superior Court.

In Talley v. California (1960), 362 U.S. 60, petitioner did not elect to exercise his discretionary right. Although this Court granted certiorari, Talley does not prohibit a petitioner from exercising his discretionary remedies.

This petitioner has gone farther than Talley. He has chosen to follow the dicta of Green and East Bay Municipal Utility District by exercising his discretionary right to file extraordinary writs with higher state courts prior to petitioning this Court.

Although technically the petition for an extraordinary writ may be a separate action, in substance the petition constitutes a request for the next highest court to review the decision of the lower court on the same case. It is a continuation of that case, and therefore an extension of the appeal of the same case.

As such, the extraordinary writ constitutes the final step in the process of review by a higher state court.

Green, East Bay Municipal Utility District, and the California Constitution affirm that there are discretionary rights of review by means of the extraordinary

writ. Petitioner was entitled to and did exercise these discretionary rights.

B. The Petition For Certiorari Is Timely.

All of the state procedures were complied with in a timely fashion. The petition for mandamus to the District Court of Appeal was timely filed. After the denial of the Court of Appeal, the petition for hearing to the Supreme Court of California was timely. The Supreme Court of California denied petitioner's petition on May 8, 1980, and the Petition for Certiorari was docketed on August 4, 1980, within ninety days of that date.

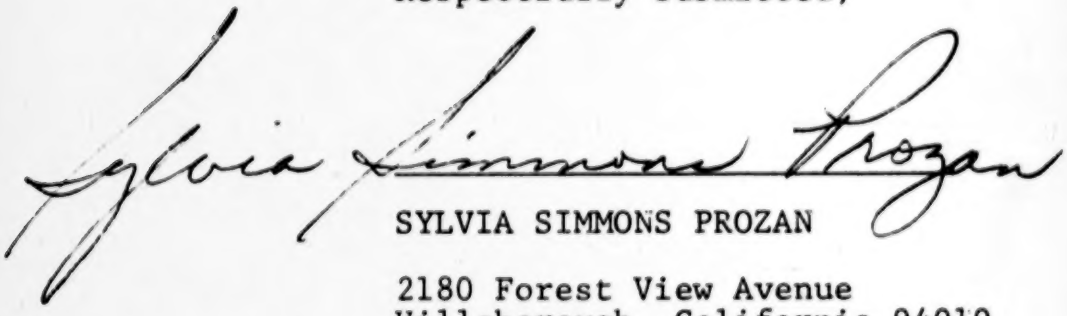
The Petition for Certiorari is, therefore, timely.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, Petitioner respectfully requests that this Court issue its Writ of Certiorari.

November 17, 1980.

Respectfully submitted,



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A P P E N D I X TO PETITIONER'S REPLY MEMORANDUM, PETITION FOR CERTIORARI

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APPENDIX

CALIFORNIA CONSTITUTION, ARTICLE 6, SECTION 10:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.***

CALIFORNIA CODE OF CIVIL PROCEDURE 1086: (WRIT OF MANDATE)

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.***